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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1946.

No. 1196

JOSEPH E. RAGEN, Warden, Illinois State Penitentiary,

Petitioner

vs.

THE UNITED STATES OF AMERICA, ex rel. JOHN H. ROONEY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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PRELIMINARY STATEMENT.

Counsel for respondent were appointed by the Circuit Court of Appeals to represent Mr. Rooney in that court. The question whether the decision of that court should be reviewed by the United States Supreme Court is believed to be so closely related to the proceedings before the Circuit Court of Appeals as to render the preparation of this brief in opposition to the petition for writ of certiorari a part of counsel's obligation to the Court and to Mr. Rooney.

OPINION BELOW.

The opinion of the Circuit Court of Appeals is reported in 158 F. 2d 346 (R. 86).

STATEMENT OF CASE.

John H. Rooney, respondent here, filed a petition for writ of habeas corpus in the District Court for the Northern District of Illinois, Eastern Division, on May 31, 1944 seeking his release from the Illinois State Penitentiary (R. 5). A general motion to dismiss, challenging the sufficiency of the petition, was filed by Joseph E. Ragen, Warden of the Illinois State Penitentiary, petitioner here (R. 52). The motion was sustained and the petition was dismissed without opinion by the District Court (R. 62). A certificate of probable cause was issued by the District Court (R. 63), and on appeal, the Circuit Court of Appeals for the Seventh Circuit in a unanimous opinion (R. 86), determined that the District Court had jurisdiction and that the petition for habeas corpus stated a cause of action of which a federal court could take cognizance, and remanded the cause to the District Court for a hearing on the merits of the petition.

Petitioner here seeks a review of the decision of the Circuit Court of Appeals, contending that the Court erred in deciding (1) that Rooney had exhausted all State court remedies available to him, so as to vest the federal court with jurisdiction; and (2) that the petition for habeas corpus, prepared as it was without the aid of counsel substantially alleged that the perjured testimony, by which the conviction was obtained, was procured by and thereafter used with the knowledge or active connivance of the prosecution.

These are the only issues raised by the petition. Although petitioner has not made a complete statement of the facts relating to other matters considered by the Circuit Court, and has made unwarranted assumptions as to the decision of the Court on those matters, we do not

deem it appropriate to discuss those facts or that part of the decision in this brief. Petitioner has prefaced his petition with an unwarranted statement that the Circuit Court's decision on the first of these two issues is admittedly in conflict with the decision of this court in *Woods* v. *Nierstheimer*, 328 U. S. 211, 66 S. Ct. 996. As will be shown, there is no such conflict.

Petitioner admits that the habeas corpus petition sufficiently alleges that the conviction was based on perjured testimony (Pet., p. 3, 19) but contends that the petition does not sufficiently allege knowledge by the prosecuting officers. Therefore the allegations relating to the prosecuting officer's knowledge that the testimony of Davidson used to convict Rooney was perjured must be considered in detail.

Petitioner does not fairly state the material averments of the petition, all of which were admitted by the motion to dismiss. The various averments, considered together, disclose a sordid, studied, continuous, and affirmative course of conduct on the part of the prosecuting officers of the State which fully justified the United States Circuit Court of Appeals in holding that the petition made ou a case within the decision of this Court in *Hysler* v. *State of Florida*, 315 U. S. 411.

This is not merely a case involving turning State's evidenced coupled with a promise of immunity as Petitioner would have this Court believe. Rather, it involves an elaborate and shameful course of action by the State, meriting vigorous condemnation. Whatever may be the privileges of the State under appropriate circumstances in bringing about the apprehension and conviction of criminals, the bounds of decency, fairness, and propriety were outrageously flaunted and abused here.

In his petition, Rooney alleges that his conviction could not have been obtained without the testimony of one Alex Davidson (R. 13), who perjured himself at the trial (R. 13) and

> "• • • testified for the State so that he would not be prosecuted for the crime and because the State's Attorney promised him employment. • • •"
>
> "There seems to be no doubt that the Assistant State's Attorney who prosecuted the case were aware that their principal witness was an untruthful individual and highly incompetent. Nevertheless, they used this confessed perjurer, and neither they nor the trial Judge would permit Defense Counsel Stewart to establish that this witness had a police record." (R. 13).

Immediately following the foregoing, these further averments appear in the petition for habeas corpus (R. 13-14):

> " 'If a state, whether by the active conduct or the connivance of the prosecution, obtains a conviction through the use of perjured testimony, it violates civilized standards for the "trial" of guilt or innocence and thereby deprives an accused of "liberty" without "due process of law."
>
> "*Hysler* v. *State of Florida*, Fla., 1942, 62 S. Ct. 688, 315 U. S. 411, 86 L. Ed. 932, affirming 1 So. 2d 628, 146 Fla. 593, certiorari granted, 1941, 61 S. Ct. 1113, 313 U. S. 557, 85 L. Ed. 1518.
>
> " 'Under this clause (14th Amendment) a federal court has authority to discharge a prisoner upon a writ of habeas corpus where it is made to appear that officials connected with trial in state court knowingly procured false testimony or knowingly perpetrated a fraud upon the court or defendant."
>
> "*U. S. ex rel. Lesser* v. *People of State of New York*, D. C. N. Y. 1940, 34 F. Supp. 730 affirmed, 1941, 117 F. 2d 30."

The petition alleges that the petitioner "was deprived

of due process, and that he has been restrained of his liberty and is being restrained of his liberty contrary to the provisions of the Illinois Statutes, the Illinois Constitution, the 4th and 5th Amendments of the Bill of Rights, and Article 4 and the 14th Amendment of the United States Constitution." (R. 18).

Among the exhibits attached to and made a part of the petition is a copy of an affidavit of Alex Davidson (R. 37-40). The affidavit, one of two made by Davidson, discloses that Davidson first denied any knowledge of the crime, but changed his story upon being promised immunity and other considerations. The affidavit states:

> "• • • I was told that if I testified for the State that I would not be prosecuted in this case and that I would be taken care of by the State's Attorney's [sic]—of Cook County, and that I would be given employment. • • •" (R. 38).

Petitioner here admits that Davidson made this affidavit "recanting his testimony and averring that he gave evidence against respondent to escape prosecution for complicity in the murder, to secure a job on the public payrolls, for cash and other ulterior considerations." (Pet., p. 4).

There is also attached to the petition an amendment (R. 46), which discloses that at the trial Davidson, despite these facts, was permitted by the State's Attorney directly to perjure himself to the Court and jury in the matter of the promise of immunity accorded him by the State. He was asked, "Have you been indicted in this case?" And he answered:

> "Never. Nobody talked to me about the possibility of my being indicted. Nobody ever suggested that I might be. It occurred to me that I might be. When it occurred to me I did not talk to anybody about

it in these interviews. I never asked the State's Attorney what he might do with me. Nothing like that had come up in the conversations. *I do not know what will happen to me. I have no idea.* I am getting some money—$12; $10 a week my wife gets and $2.00 a week I get for cigarettes and so forth. In addition to that my keep is being paid for over there at the Palmer House, by the State's Attorney." (R. 47).

Davidson also failed to mention that among the various "considerations" extended to him by the State's Attorney was employment on public payrolls. The petition by way of an amendment (R. 47, 50) states that shortly after this trial Davidson was employed by the city as a laborer and that he was carried on the payroll as such for a good portion of the time during the latter part of 1933 and for some five or six years subsequent thereto. Petitioner here admits these allegations (Pet., p. 4).

The petition disclosed a continued course of action before, during and after trial on the part of the State far beyond anything within legitimate bounds. At the very outset it appears that Rooney was kidnapped in the State of Wisconsin by a squad of State's Attorney's police and shanghaied to Chicago. The concerted efforts to obtain a conviction irrespective of the means employed, is vividly illustrated by the testimony of Police Officer Charles W. Pribyl, a prosecution witness:

"We did not have a warrant when we went up to Wisconsin. We did not obtain any legal extradition papers of any kind. When we raided the Berwyn [Illinois] place we did not have a warrant. We did not have any search warrant. The owner of the building [in Berwyn] was in charge of the premises. There was nobody in charge of the flat. We gained admittance with a pass key from the owner. When we went to the Union Headquarters [in Chicago] and seized the records and raided it we did not have a warrant.

> We did not have any search warrant either time. We did not have a warrant or search warrant when we went out to the garage [at another place in Berwyn] and seized the Plymouth. We went in through a window of the garage. We had the safe of the Union drilled. We forced entrance into it." (R. 24-25).

This witness also testified that when the State's Attorney's police kidnapped Rooney at Eagle River, Wisconsin, they brought him "to the State's Attorneys' office and turned him over to Mr. Coghlan and Mr. Wilbur Crowley," Assistant State's Attorneys (R. 24).

The defiance by the State of Rooney's constitutional guarantees was continued at the trial, when the State introduced into the record evidence illegally seized in the various "raids" referred to by Officer Pribyl, despite the fact that Rooney's motion to suppress the evidence had been sustained, and in the face of the confession of the motion by the State's Attorney (R. 22, 24-25). On review by the Supreme Court of Illinois of Rooney's conviction, the Court, while holding that the use of the illegally seized evidence was error and was improper conduct on the part of the State's Attorney, (*People* v. *Rooney*, 355 Ill. 613, 623-624,) concluded that the errors in this regard were not sufficiently prejudicial to warrant reversal.

All of the foregoing factors bear directly and immediately upon the matter of the motives of the prosecuting officers and their knowledge of the position of Davidson, and of the falseness of the testimony given by him at the trial.

Following his conviction and immediate incarceration respondent was subjected to further deprivation of his constitutional rights in that he was not permitted by the Warden of the State Penitentiary to seek redress in the courts *pro se*. He was without funds to retain counsel.

Respondent has been incarcerated in the Illinois State Penitentiary for almost fourteen years. The decision of the United States Circuit Court of Appeals does no more than afford him an opportunity to prove the averments of his petition.

ARGUMENT.

I.

The Circuit Court of Appeals properly held that in order to exhaust state court remedies so as to vest the federal court with jurisdiction, it was not necessary to pursue the Illinois statutory substitute for the common law writ of error coram nobis, because the five year limitation period within which the remedy is required to be brought, had elapsed and the remedy was therefore not available.

Petitioner here correctly contends that before jurisdiction by petition for habeas corpus may be entertained by a federal court it must appear that petitioner has exhausted the remedies available to him under the laws of the state of his incarceration. There are but two possible remedies under Illinois laws, (1) petition for writ of habeas corpus, and (2) motion for statutory writ of error *coram nobis*.

It is conceded Rooney has exhausted the first mentioned remedy.*

Petitioner here contends that the Illinois statutory substitute for common law writ of error *coram nobis* provided by Section 72 of the Illinois Civil Practice Act, (Ill. Rev.

* In listing the steps taken by Rooney to exhaust the remedy by habeas corpus in the Illinois courts, petitioner neglected to mention that Rooney petitioned for and was denied, (without opinion or comment,) the writ of habeas corpus by the Illinois Supreme Court on August 19, 1944 (R. 43). Rooney also petitioned for writ of certiorari from the United States Supreme Court to the Illinois Supreme Court. The petition was denied for the reason that the application was not made within the time provided by law (Rooney v. Ragen, 324 U. S. 851). Rooney had been unable to file his petition for certiorari at an earlier date because of the rule of the warden denying prisoners the right of access to the courts pro se.

Stat. 1945, Ch. 110, Sec. 196,) was available to Rooney and that he did not exhaust that remedy. Respondent asserts that the supposed statutory remedy was not available at the time he was for the first time enable to invoke *pro se* the jurisdiction of the District Court because the five-year statutory period for invocation of the statutory State court remedy had expired.

Judgment was rendered against Rooney August 12, 1933 (R. 20), his conviction was affirmed by the Illinois Supreme Court February 23, 1934, and a rehearing denied April 10, 1934 (*People* v. *Rooney,* 355 Ill. 613). His petition for habeas corpus was filed May 31, 1944 (R. 5), long subsequent to the expiration of the five year limitation period applicable to the statutory *coram nobis* proceeding.

Petitioner's contention is that the running of the five year limitation period was tolled because of petitioner's duress, in that Rooney was in the penitentiary and was denied the right to communicate with the courts *pro se.* Respondent's answer is that the *coram nobis* statute specifically provides that in order to toll the statute the petitioner must prove duress, "*at the time of passing judgment.*" (Ill. Rev. Stat. 1945, Ch. 110, Sec. 196. The statute is set forth in full at the bottom of page 7 of the Petition.) Rooney was not incarcerated "at the time of passing judgment," and it is obvious, therefore, that the duress upon which petitioner relies to toll the five year period is not that which is provided for in the statute. Petitioner has no answer to the express words of the statute; petitioner does not even comment on the statute.

The recent opinion of the Illinois Supreme Court in *People* v. *Rave,* 392 Ill. 435 (1946), squarely passed upon the question here in issue in its holding that incarceration in the State Penitentiary is not duress within the lan-

guage of the statute because such duress does not exist *at the time of passing judgment.* There petitioner was denied remedy under the statutory substitute of *coram nobis* on a motion filed more than five years after rendition of final judgment of conviction. The petition alleged that petitioner had been sentenced to life imprisonment under the Habitual Criminal Act on the basis of a prior conviction for burglary which was not a lawful conviction. The Court, in holding that the five year limitations period is tolled for duress only when the duress relied upon is present "at the time of passing judgment," said (pp. 443-45):

> "A further reason why plaintiff in error was not entitled to a hearing on his petition for a writ of error *coram nobis* is that said proceeding was not brought by the defendant within the period of five years after the rendition of final judgment in the case, as provided by section 72 of the Civil Practice Act. Plaintiff in error was last convicted on December 3, 1934, and his conviction was affirmed by this court on June 17, 1936, and rehearing denied on October 7, 1936. The petition for a writ of error *coram nobis* was not filed in the criminal court until November 10, 1944.
>
> "This question was raised by the State's Attorney in his motion to dismiss the petition for a writ of error *coram nobis.* Plaintiff in error says that the statutory period of five years does not apply to a person under duress and that one sentenced to life imprisonment certainly is not free to engage even in most necessary litigation and must be considered in duress. However, a reading of this section shows that *the disability or the duress must exist at the time of passing judgment.* • • • The serving of the sentence by the defendant subsequent to the passing of the judgment would not stop the running of the statute provided the defendant was not under duress *at the time of the passing of the judgment.* • • • We do not believe that this constitutes

duress within the meaning of said exception in the provision fixing the period of limitation at five years.

• • •

"Therefore, even if the plaintiff in error had a valid defense and was free from negligence in not presenting his defense *before* the rendition of the judgment in question, he is not entitled to relief in this proceeding, since the statute has run against him and he has no valid excuse for not commencing this proceeding earlier." (Emphasis ours.)

In *People* v. *Sprague,* 371 Ill. 627, quoted in the *Rave* opinion, Sprague was convicted of murder on a plea of guilty. Eleven years after his conviction he filed a motion alleging among other things that he was not represented by counsel and did not understand the effects of his plea. The court affirmed the denial of the motion holding that the motion for *coram nobis* under the statute was not available after the five years had elapsed.

In the very recent case of *People* v. *Touhy,* ..... Ill. ..... (No. 29984, March 19, 1947), the Illinois Supreme Court expressly affirmed the holding in the *Rave* case. The Court held that in accordance with the *Rave* opinion, the motion for *coram nobis* based on allegations of perjured testimony was properly dismissed because the motion was not made within the five year period.

Petitioner attempts to distinguish the *Rave* case on the ground that the acts of state prison officials in frustrating attempts of the prisoner to file petitions for *coram nobis* were not alleged or made the basis of any claim in the *Rave* case (Pet., pp. 9, 16). Such allegation of duress after judgment could not possibly have altered the decision in view of the holding that irrespective of the nature of the duress, it must have existed at the time of passing judgment in order to toll the statute. In order to confer juris-

diction on the Federal District Courts, it is sufficient if the peitioner shows that he has exhausted the state court remedies which "still remain open" (*Mooney* v. *Holohan*, 294 U. S. 103, 115). It is unnecessary to show that he has been deprived of one of the state court remedies by the illegal acts of a state official.

In *People* v. *Austin*, 329 Ill. App. 276, 67 N. E. 2d 88[illegible] (Abst. opinion, 1946), the Illinois Appellate Court had before it the identical issue here raised. The defendants filed a motion for the statutory substitute for writ of error *coram nobis* after the five year period of limitations had elapsed, setting forth an affidavit of recantation by the principal witness who had perjured himself at the trial. Defendants alleged that "their efforts to file a writ of error *coram nobis* were stopped because their petitions were never permitted to pass the prison gates" until abrogation of the above-mentioned practice. The Illinois Appellate Court held that such duress did not toll the statutory period of limitations because the duress did not exist at the time of passing judgment, as required by the statute. *Leave to appeal was denied by the Illinois Supreme Court* (330 Ill. App. ii).

Petitioner does not deny that the *Austin* case is directly in point, but urges that it is not authoritative because "decisions of the Illinois Appellate Court do not invoke *stare decisis* and are not binding on federal courts in ascertaining the Illinois law," (Pet., p. 10) and are no more authoritative "than are decisions of the circuit courts or justices of the peace" (Pet., p. 17). Petitioner fails to inform this Court that the Illinois Appellate Court Act was amended in 1935 to make the decisions of that Court binding upon other Illinois Courts under the rule of *stare decisis*.

Graham v. *White-Phillips Co.*, 296 U. S. 27 (1935), cited

by Petitioner in support of this proposition, was decided under the provisions of the former Illinois Appellate Court Act which provided:

> "• • • such opinions shall not be of binding authority in any cause or proceeding, other than in that in which they may be filed." (Smith-Hurd Illinois Rev. Stat. 1933, ch. 37, sec. 41).

Subsequent to the *Graham* case, that provision of the Act was repealed (Ill. Rev. Stats. 1945, Ch. 37, Sec. 41). The principle enunciated in the *Graham* case has been expressly rejected by numerous subsequent decisions of this Court, including one case involving a decision of the Illinois Appellate Court.

The law is clearly enunciated in *Fidelity Union Trust Co.* v. *Field,* 311 U. S. 169. There the Circuit Court of Appeals had recognized its duty to follow the law of the State, but took the view that it was bound only by the pronouncements of the state court of last resort. In an opinion reversing the decision of the Circuit Court of Appeals, Chief Justice Hughes said (pp. 177-178):

> "We think that this ruling was erroneous. • • • An intermediate state court in declaring and applying the state law is acting as an organ of the State and its determination, in the absence of more convincing evidence of what the state law is, should be followed by a federal court in deciding a state question."

The same question has arisen in numerous cases, especially since *Erie Railroad Co.* v. *Tompkins,* 304 U. S. 64. In each instance this Court has made the same holding (*Blair* v. *Commissioner,* 300 U. S. 5, 10; *West* v. *A. T. & T. Co.,* 311 U. S. 223, 237; *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464, 467; *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U. S. 538, 543).

Petitioner makes the further argument that the *Austin* case is not authoritative because it is a decision of the Appellate Court on a constitutional question (Pet., pp. 9-10, 17). Admittedly the Appellate Court has no jurisdiction to decide a constitutional question, but no constitutional question was involved in the *Austin* case. The question before the Court was whether interference by prison officials with a prisoner's attempts to file a writ of error *coram nobis* tolls the statute of limitations. This in no way involved the construction of the Constitution. It is merely a question of interpretation of the limitations provisions of the statute, which was clearly within the jurisdiction of the Appellate Court to decide. Not without significance is the further fact, noted above, that the Supreme Court of Illinois denied leave to appeal in the *Austin* case.

The holding of the United States Circuit Court of Appeals on this point, based on the Illinois cases, is clear and correct:

> "Thus the law of Illinois is definitely settled that the remedy is unavailable after the expiration of the five year limitation period unless there was duress at the time of passing judgment; furthermore, that confinement in prison is not duress within the meaning of the statute. Thus this Illinois remedy was no longer available to petitioner, and any effort on his part to invoke such remedy would have been merely an idle and useless gesture." (R. 97).

At the time Rooney filed his petition for habeas corpus in the District Court, there was no state remedy which still remained available to him. In *Mooney* v. *Holoham*, 294 U. S. 103, this Court pointed out that the state court remedies coming within the rule are those which *"still* remain open." The Court said (p. 115):

> "Orderly procedure, governed by principles we have

> repeatedly announced, requires that before this Court is asked to issue a writ of *habeas corpus,* in the case of a person held under a state commitment, recourse should be had to whatever judicial remedy afforded by the State *may still remain open.''* (Emphasis ours.)

Substantially the same premise is expressed by the Court in *Ex Parte Hawk,* 321 U. S. 114, 118:

> "But where resort to state court remedies has failed to afford a full and fair adjudication of the federal contentions raised, *either because the state affords no remedy,* see *Mooney* v. *Holohan, supra,* * * * *or because in the particular case the remedy afforded by state law proves in practice unavailable or seriously inadequate,* cf. *Moore* v. *Dempsey,* 261 U. S. 86; Ex parte Davis, 318 U. S. 412, a federal court should entertain his petition for habeas corpus, else he would be remediless." (Emphasis ours.)

Petitioner states repeatedly throughout his petition and brief that the Circuit Court recognized that its decision is in conflict with the opinion of this court in *Woods* v. *Nierstheimer,* 328 U. S. 311, 66 S. Ct. 996. This is an incorrect and wholly unwarranted statement. The Circuit Court discussed the *Rave* case and the *Austin* case, decided subsequent to the *Woods* decision, and held that the Illinois law is now definitely settled that the remedy is unavailable in the situation presented in the case at bar, and it would be a useless gesture for petitioner to invoke such remedy. The Court then clearly indicated that therefore the *Woods* decision was inapplicable, saying:

> "Certainly the Supreme Court in the *Van Woods* case did not intend to imply nor is this court required to hold that petitioner was required to engage in such futility.'' (R. 97).

The Circuit Court was entirely correct in holding the

Woods case inapplicable. The *Woods* case was before this court on certiorari to the Criminal Court of Cook County, Illinois, and the Circuit Court of Randolph County, Illinois, to review the final judgments of those courts denying petitions for writ of habeas corpus. That case did not involve any question of the jurisdiction of the Federal Courts to entertain jurisdiction on an original petition for habeas corpus. The petitions filed in the State Courts in that case alleged petitioner was innocent of the crime of which he had been found guilty and that he had been beaten with blackjacks and clubs, threatened with instant death, and tricked into signing a confession. The petitions further alleged that he was deprived of counsel until he was brought into court, and that when finally brought into court, the public defender who appeared as his counsel would not allow him to present his defense or to explain the circumstances surrounding the confession, and entered a plea of guilty against petitioner's will. It was further alleged that both the public defender and the State's Attorney threatened petitioner by telling him he would burn in the electric chair if he did not keep his mouth shut.

Counsel for the State conceded that the allegations, if true, would violate due process. But, it was contended that the denial of the applications for habeas corpus was not based on the decision of the federal question of violation of due process, but was based on the non-federal ground that habeas corpus was not the proper remedy under Illinois law. The holding of this Court was that it had no power to review the judgments because under the Illinois law the denials of the applications for habeas corpus probably rested on the non-federal ground that habeas corpus was not the proper remedy in the case presented to the court.

It was argued by counsel for petitioner that *coram nobis* was the only other possible remedy and since the five year period of limitations for *coram nobis* had expired, the denial of the petitions for habeas corpus left him without any remedy in the State courts, and therefore a federal question was raised and the *coram nobis* limitations statute was unconstitutional.

It should be noted that the adoption of this argument would not have changed the Court's decision. Even if *coram nobis* were not available and if the statute were unconstitutional, it would not change the determining fact in the case that the denial by the State courts of the applications for habeas corpus probably rested on the nonfederal ground that habeas corpus was not the proper remedy. The unavailability of *coram nobis* could not affect the scope of the State habeas corpus writ. The only issue before this Court was whether to dismiss the petitions for certiorari or to reverse the holdings below which denied petitioner an opportunity to prove his allegations in the habeas corpus proceedings in the State courts.

This Court made several answers to the ingenious but specious argument of Woods' counsel. Certain of them appear in the excerpt from the opinion printed in petitioner's brief in the case at bar (Pet., p. 18). This Court's final answer, not quoted by petitioner, was that if no remedy was available in the State courts, the federal courts would be available to provide a remedy.

Petitioner here relies on the statement of this Court in the *Woods* opinion that it could not be said that the five year limitation statute would be construed by the Illinois courts to bar the *coram nobis* remedy to petitioner on the

facts there present.* That statement is certainly true because there was a factual issue which required the construction of the statute. The issue was whether the duress there alleged was sufficient to toll the statute. Since the physical duress, trickery and threats of death all existed at the time of passing judgment, the duress was of the kind which might well fall within the language of the statute. However, in the case at bar, the alleged duress was not present at the time of passing judgment, as specifically required by the statute. Therefore, the alleged duress could not possibly have been held to have tolled the running of the statute. The *Woods* case is not in point in the case here presented to the Court. Also, the *Austin* case has determined that the denial of prisoner's rights to communicate with the courts does not constitute duress within the meaning of the statute.

Counsel for petitioner cites the *Woods* case for the proposition that it must be presumed that the *coram nobis* remedy is available even after five years *because State officials have frustrated petitioner's attempts to communicate with the courts during that time* (Pet. pp. 19, 9, 16). This type of duress was not even mentioned in the *Woods* case! The duress alleged was various forms of physical and mental coercion which occurred before and at the time of passing judgment. Counsel must have assumed that this Court in the *Woods* case took judicial notice of the acts of the warden without mentioning that it was doing so. Even if that is the fact, the *Woods* case merely serves as a guide to

*On September 20, 1946, subsequent to the Woods opinion in this court, the Illinois Supreme Court denied Woods' petition for leave to appeal from the dismissal of a coram nobis motion by the Criminal Court of Cook County (Woods v. People of Illinois, —— Ill. ——, September Term, 1946, No. 29747).

the Illinois law as of that time it was decided. That law has been settled by the holding in the *Austin* case that such acts of the warden do not constitute duress which tolls the statute of limitations. Even under the holding in the *Rave* case, (392 Ill. 435,) such acts would not constitute duress because they occurred after the passing of judgment. Incidentally, it should be mentioned that counsel for petitioner is correct in stating that the *Rave* case was called to the attention of this Court in the briefs in the *Woods* case. However, in the *Woods* case counsel quoted only one sentence which sentence was urged in support of another point and therefore the statement in the opinion of the Circuit Court is substantially accurate.

II.

The Circuit Court of Appeals properly held that the petition for habeas corpus, with or without the attached affidavits sufficiently alleges that the perjured testimony, through the use of which the conviction was obtained, was procured and used with the knowledge or active connivance of the prosecution.

The petition for habeas corpus alleges that Davidson's testimony was perjured, and that a conviction could not have been obtained without Davidson's testimony. Petitioner here admits that in the affidavits attached to the petition for habeas corpus Davidson deposes "that the testimony that he gave against respondent at respondent's trial was perjured and that respondent was in fact innocent" (Pet. Br., p. 19), and that the conviction was based on the testimony of Davidson (Pet. Br., p. 3). Thus the only issue raised by petitioner is whether the petition for habeas corpus sufficiently alleges, as against a general motion to dismiss *which does not challenge the form of the allega-*

tions, that the prosecuting officials had knowledge that the testimony was false.

On this issue, the motion to dismiss the petition for habeas corpus merely stated that the petition alleged "no violation of the Constitution of the United States". (R. 52) It contained no assertion of the alleged defects of form now relied upon in this Court. Although the opinion of the Court below did not mention the point, it might well be held that this issue was not raised by the general motion to dismiss.

The gist of petitioner's argument on this point is that although Davidson in his affidavit states that in his interviews with the prosecuting officers he first denied that respondent was guilty of the crime and then changed his story so as to affirm respondent's guilt in consideration for leniency, a job on the public payrolls, and other ulterior considerations, nevertheless this does not charge that the prosecuting officials knew the testimony was perjured (Pet., p. 10, 19). This argument ignores the issue and places undue emphasis upon the Davidson affidavit. The issue is whether the petition for habeas corpus considered together with all the supporting papers, including Davidson's affidavit, substantially alleged knowledge on the part of the prosecuting officers. The holding of the Circuit Court was that the habeas corpus petition, aside from Davidson's affidavit sufficiently charged that the prosecuting officials knew that Davidson's testimony was perjured. The Court said (R. 92-93):

> "The petition, of course, would have been in more perfect form if it had directly alleged knowledge, but we are of the view that these allegations taken together, and when liberally construed in favor of the petitioner as they must be, substantially allege knowl-

edge or, in the words of the Supreme Court in the *Hysler* case, *supra*, 'active conduct or connivance' on the part of the prosecution.

"It must be borne in mind that what we have said has to do only with the sufficiency of the petition to entitle the petitioner to a hearing, providing the court otherwise has jurisdiction. As already indicated, we think too much importance has been attached to Davidson's affidavit. The fact is it is of no consequence except as it is made a part of the petition and furnishes support thereto."

Petitioner makes no argument that the habeas corpus petition does not allege knowledge on the part of the public officials. The entire argument is directed to the Davidson affidavit alone. From the false premise that the sufficiency of the petition is to be determined solely by the sufficiency of the Davidson affidavit, petitioner argues that the Circuit Court held that bargaining with an accomplice constitutes a denial of due process (Pet. pp. 11, 19). The obvious purpose of such distortion of the holding of the Court is to create the erroneous impression that a new precedent of "crucial" importance would be created if respondent be afforded a hearing in this case.

We have set forth in the supplemental statement of the case the averments of the petition relating to the prosecuting officers' knowledge. We shall not repeat them here. The petition, when taken as a whole, sufficiently charges knowledge. Although the petition was drawn by a layman unskilled in the drafting of legal papers, the averments, including particularly the quotations from cases relating to convictions obtained upon "knowingly procured" false testimony, leave no doubt of the intended meaning, and are sufficient as against a general motion to dismiss. (Cf. *Cochran* v. *Kansas*, 316 U. S. 255, 257.)

In the recent case of *Tomkins* v. *Missouri*, 323 U. S. 485, 487, this Court aptly stated the rule by which federal courts are to be guided in considering the sufficiency of pleadings drawn by unskilled prisoners. It said:

> "The petition is not drawn with the desirable precision and clarity. But we can hardly demand of a layman and pauper who draws his petition behind prison walls the skill of one trained in the law. If we were to take that course we would compound the injury caused by the original denial of counsel. A deprivation of the constitutional right of counsel should not be readily inferred from vague allegations. But where the substance of the claim is clear, we should not insist upon more refined allegations than paupers, ignorant of their right of counsel and incapable of making their defense, could be expected to supply."

To the same effect, on the question of technical sufficiency of the petition, see *Rice* v. *Olson*, 324 U. S. 786, 791; *Holiday* v. *Johnston*, 313 U. S. 342, 350, 351; *Bowen* v. *Johnston*, 306 U. S. 19. In the *Rice* case, above, this Court commended the Supreme Court of Nebraska for treating "this clumsily drawn petition with liberality, instead of dismissing it because of a failure to comply with the precise niceties of technical procedure. * * * And this treatment is in line with federal practice."

Furthermore, the petition must be considered as a whole. Where thus considered it discloses an elaborate, persistent, studied and pernicious plan and course of improper conduct on the part of the State prosecuting officers. The facts alleged, and admitted by the motion to dismiss, show that the prosecuting officers knew of the bargain made with Davidson as part of the previously conceived plan. The bargain was consummated when Davidson was presented before the jury as vouched for by the prosecutor and the

sovereign state he represented. A conviction was secured on the basis of his testimony. Petitioner argues that in cases of this kind no harm has been done, because the alleged accomplice who "turned states evidence" is subjected to cross-examination which reveals that his testimony was given as the result of promised lenity (Pet. p. 20). That was not true here because the prosecuting officers sat silently by while Davidson perjured himself on cross-examination about the agreement to which they were a party. The record shows that at the trial Davidson was asked: "Have you been indicted in this case?" and that he answered:

> "Never. Nobody talked to me about the possibility of my being indicted. Nobody ever suggested that I might be. It occurred to me that I might be. When it occurred to me I did not talk to anybody about it in these interviews. I never asked the State's Attorney what he might do with me. Nothing like that had come up in the conversations. *I do not know what will happen to me, I have no idea.*" (R. 47).

Counsel argues further that the question whether the confederate is committing perjury "is left to a jury upon full disclosure of the interest of the accomplice in helping to secure a conviction of co-defendants" (Pet., p. 21). We ask, "How can that function be fulfilled when the jury is unaware of the bargain that preceded and procured the perjured testimony upon which they base their conviction, and when the witness does not recant his testimony until *after* the trial and conviction has been had?"

CONCLUSION.

We believe that we have demonstrated that the decision of the Circuit Court of Appeals is correct. The petition for writ of certiorari should be denied because the decision below presents no question justifying issuance of the writ either in the exercise of this Court's supervisory powers or under the rules laid down to govern the granting of such writs.

In justice to Mr. Rooney the following facts should be brought to the attention of this Court. Mr. Rooney was convicted in 1933. Although it does not appear when he first learned of the facts set forth in his petition, it may be presumed that this was shortly after Davidson's first affidavit in 1936 filed in support of the petition of one Berry for parole. The rule barring resort to the Courts was then in effect and so remained until 1943 when the then Warden of the Illinois State Penitentiary abrogated the rule. Rooney promptly sought in vain to have his complaint heard by petitions for habeas corpus in the Circuit Court of Will County, the Criminal Court of Cook County and the Supreme Court of Illinois. He petitioned this Court twice for certiorari to review these decisions. In May 1944 he filed his petition for writ of habeas corpus in the Federal District Court. Thus, after fourteen years Rooney is still waiting for a hearing on the merits of his claim that he is illegally incarcerated.

The Attorney General would now have this Court say to Mr. Rooney: "Although what you intended to say is obvious to everyone concerned, yet to satisfy legal technicalities, you must insert the word 'knowingly' in your petition. Furthermore, although it is apparent that the *coram*

nobis remedy will be denied you by the Illinois courts because the statute of limitations has run, nevertheless you must make the idle gesture of filing a *coram nobis* motion in the Illinoils courts. Then come back to the Federal District Court and that Court will grant you a hearing on the merits of your petition." Can it possibly be said that the ends of justice would be served by the granting of this petition for certiorari under such circumstances?

With all due deference to the skill and unquestioned good faith and fairness of our learned opponents, we respectfully suggest that the arguments they have advanced before this Court fall within the category of technicalities recently criticized by Judge Elwyn R. Shaw in *U. S. ex rel. Howard* v. *Ragen*, 59 F. Supp. 374 (Ill.). Although the determining facts there were distinguishable from those of the case at bar, the concluding paragraph of the opinion is most appropriate:

> "Technical arguments may very well be indulged in behalf of liberty. They may not be resorted to by the Government in restraint of liberty. The State is sovereign and neither needs nor can accept any technical advantage over a subject."

Respectfully submitted,

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